Supreme Court U. S.
F I L E D
JUN 8 1976

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-6

HELEN FAYE GENERES, *Appellant*,

vs.

EUGENE D. STICH, et al., and the CALIFORNIA COURT OF APPEAL
STATE OF CALIFORNIA, *Appellees*

Appeal

and/or

PETITION FOR A WRIT OF CERTIORARI
to the California Court of Appeal
Third Appellate District

HELEN FAYE GENERES
2538 Waldon Street
Redding, California 96001
Telephone (916) 243-0586
Appellant

IN THE SUPREME COURT

of the

UNITED STATES

October 1976 Term

HELEN FAYE GENERES Appellant

vs.

EUGENE D. STICH, et al., and the Court of Appeal, State of California.

Appellees.

APPEAL and/or PETITION FOR CERTIORARI

HELEN FAYE GENERES, Appellant, prays for review of that portion of the judgment on remittitur in favor of Thomas F. Brown entered in Minute Book 107 at page 431 on March 31, 1976 of the Shasta County Records - Appendix D. The Notice of Appeal was filed in the Court of Appeal on March 24, 1976. Appendix F.

The decision of the Court of Appeal has an adverse negative impact on the survival of the nation's real estate industry and the rights of real estate licensees to serve the public and earn a livelihood. It has given (in effect) the right to the attorneys to foster anticompetitive practices in restraint of trade and to create a monopoly in violation of the Sherman Act 15 USCS §1 for their own economic gain and in essencemakes a real estate license "valueless".

The petition for rehearing was denied, without opinion. The petition for hearing was denied, without opinion March 24, 1976.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257

> "The SupremeCourt has authority to review on direct appeal the decision of a State Court."

(1974) Lessi v. Cohn 493 F2d 826
(1975) Goldfarb et ux vs. Virginia State Bar 44 L. Ed. 2d 572

QUESTIONS PRESENTED

1. Whether Fifth and Fourteenth Amendment Rights and Guarantees of Due Process and Equal Protection of the Laws permit invidious discrimination against the nation's real estate industry by the attorneys and their clients to deprive this appellant broker and all other brokers of their Rightfully Earned Compensation on which they depend for a Livelihood?

2. Does a Court of Appeal abuse its discretion in making a decision in contradiction to all applicable court decisions that state the real estate broker is entitled to her compensation?

3. Does a Court of Appeal abuse its discretion in substituting its judgment for the trial court that determined the seller could not collusively agree with the buyers in connivance with their attorneys to rescind, abandon, arbitrarily refuse to consummate the sale, or agree they did not intend to be bound by the executed sales contract; or withdraw the property from the market to deprive the broker of her compensation when the broker is protected by her exclusive employment contract for her compensation?

4. Does a Court of Appeal abuse its discretion in reversing a judgment against the seller in favor of the broker on her cross-complaint when there was no adversary hearing between the Seller and the Broker in Appeal and the Seller did not appeal the judgment in favor of the broker?

5. Can a buyer not a party to the contract between the broker and the seller appeal a judgment in favor of the broker against the seller?

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U. S. C. 1257:

> "Final judgments and decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court of the United States."

Amend. V.

> "No person shall be deprived of life, liberty, or property without due process of law."

Amend. XIV:

> "No State shall make or enforce any law which shall abridge the privileges of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES OF CALIFORNIA

Civil Code §1573: Constructive Fraud consists of any breach of duty, without an actual fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him.

Civil Code §1625: provides the execution of a contract in writing supersedes all the negotiations or stipulations concerning the matter which preceded or accompanied the execution of the instrument."

Statutes of Frauds: California Real Estate Regulations provides that contracts be in writing to protect the parties and the real estate broker to her compensation

Best Evidence Rule: The documents are the best evidence.

Civil Code 428.40: In California the Cross-Complaint is a separate document complete in itself.

Covenant of Good Faith and Fair Dealing:

Witkin on Contracts §576 Vol. 1 Page 493

"There is implied in every contract a covenant of Good Faith and Fair Dealing."

STATEMENT OF THE CASE

The buyers (Stiches) sued the broker petitioner for return of $20,000. alleging the seller could not deliver in accordance with the executed sales contract and they were entitled to return of the $20,000. earnest money paid to the seller's agent (appellant- broker) on the purchase price. The trial court determined the buyers had neither the need or the right to rescind and were not entitled to declaratory relief.

Appellant broker's cross-complaint alleged breach of contract, breach of trust, and tort actions against the seller, the buyers and others.

The broker was licensed by the State of California. The broker and the seller executed a binding employment contract for the sale of the business. The buyers and the seller executed a binding sales contract. The seller owed the broker $20,439.30. Title to the $20,000. earnest money paid on the purchase price transferred to the seller when he executed the sales contract. The seller and buyers were not adversary parties. The seller did not appeal the judgment against him in favor of the broker. The buyers did not appeal the judgment against them in favor of the seller for $22,600. The broker could not appeal a judgment in her favor against the seller. The buyers appealled the judgment in favor of the broker against the seller alleging the seller could not use their money to pay his obligations to the broker.

The Court of Appeal reversed and ordered appellant broker to return the $20,000. to the buyers.

As a matter of law the seller is liable to the broker for her compensation as determined by the trial court. Appendix "A" Pages 2 and 3: para. 1-6; page 4(b) A.B.C.; pages 9 and 10: para. 3; Page 14: para. 5; page 15: para. 6; Page 17: Para. 9; Page 11: Para. 4.

The seller not only refused to consummate the sale, but withdrew the property from the market in spite of the fact that the listing had not expired; refused to sell to any of the buyers produced by the broker; and turned around and sold the property using the contract as leverage and obtained $35,000. more for the business.

The seller was estopped to disclaim the broker's vested rights to her commission. He voluntarily executed the employment contract and the sales contract and he knew exactly what he was doing. He took the sale into his own hands to finalize it. [Reporter's transcript 81:4-7 and 22-28. The seller owed the broker $20,439.30 for her services. The seller after taking the sale into his own hands arbitrarily refused to consummate the sale. In evidence the employment contracts Exhibit "T" and "U" at 276; the broker's license Exhibit "H" at 253; see Exhibit "F" 224-226. The buyers and seller statement made in connivance with their attorneys they did not intend to be bound by the executed sales contract was entitled to no credibility. [Reporter's Transcript 303: 9-19; 502:1-9; 134:19-25; Appendix A page 4 (a) III para. 1 and 2; page 4 (b) A.B.C.; page 14: para. 5; page 15: para. 6; Page 17: para. 9.

THE UNDISPUTED FACTS ON WHICH THE CASE WENT TO TRIAL--[Appendix B pages 2 & 3:1-6]

Appellant broker was licensed by the State of California to sell businesses. The seller and broker executed a binding employment contract for the sale. The buyers and seller executed a valid and binding sales contract. The broker was not required to see the contract was performed. She earned her commission. The seller then took the sale into his own hands to finalize.

The trial court determined by the written documents and the facts and circumstances surrounding the transaction and the activities of the parties in reliance on the sales contract, that the buyer and seller voluntarily executed the sales contract and intended to be bound by it when they signed and executed it.

THE COURT OF APPEAL DECISION IS AGAINST THE LAW.

"The right to a broker to her compensation is not affected by failure of either party to carry out the agreement."

(1961) Cardoza vs. Moorehouse 197 CA2d 76 [4]

"The broker's commission was earned by previous performance."

Collins vs. Vicker Manor, Inc. 47 C2d 875

"The down payment paid by the buyers (here Stiches) to the Seller's agent (here Broker Generes) pursuant to a Deposit Receipt in performance of the contract belonged to the seller when he accepted the contract."

(1951) Norris v. San Mateo 37 C2d 270 [4]
(1962) McKinley v. Lague 207 CA2d 284-286 [17]

A broker has a right to offset her compensation out of the earnest money paid the seller pursuant to the deposit receipt.

Downey v. Humprheys 102 CA2d 323 at 335

"A broker cannot be deprived of her commission by seller's collusive agreement to terminate the contract of sale. The binding written promises upon which a third party relies for compensation earned may not be so casually reduced to mere illusory texture." Mutual consent to recission of the contract could not deprive the broker of her commission."

(1961) Cochran vs. Ellsworth 197 CA2d 429 at 430
(1972) Holmes vs. Steele 269 Cal App. 2d 675
(1972) Seck vs. Foulks 25 Cal. App. 3d 556
(1974) Blank vs. Borden 11 Cal. 3d 363
(1975) E. H. Boly & Son, Inc. v. Schneider 525 F2d 20 (9th Cir.)

The trial court found the buyers and seller acted in collusion and bad faith and their testimony was entitled to no credibility.

"All issues of credibility are within the proviso of the trier of the fact."

(1969) Waller vs. Gaskill 72 Cal. Rptr. 228 [2, 3, 4, 5, 6, 7 & 8]

(1972) Nestle vs. San Monica 6 Cal. 3d 920 [2]

"The trial court is entitled in rendering judgment to ignore oral evidence on the grounds that it is improper and should have no weight in deciding the rights of the parties." 98 ALR 826

The brokers rights were "vested" under her employment contract with the seller; and collusion and bad faith between the buyers and the seller to abandon the contract, resolve their differences, and agree they did not intend to be bound by the executed binding contract cannot deprive the broker of her compensation owed her by the Seller.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeal decision is in conflicts and contradicts all applicable decisions.

2. The case is of great public importance as the Court of Appeal decision has an adverse negative impact on the nation's real estate industry as it destroys the rights of third party beneficiaries who rely on contracts for their compensation and livelihood.

3. There was no due process. There was no adversary hearing in the Court of Appeal between the broker and the seller. The seller did not appear. The broker could not appeal a judgment in her favor against the seller. The seller did not appeal the judgment in favor of the broker against him.

The buyers and the seller's contract was separate from the contract between the broker and the seller. The seller and the buyers acted in "collusion" with the intent to deprive the broker of her compensation.

> "The contract with the realtor is separate from the contract between the buyer and the seller and one does not depend on the other. This is evidenced by the rule that in an action by the broker for his commission this cause of action does not depend upon the seller having completed the deal with the buyer."

Lyon vs. Giannoni

168 CA2d 336 at 339; 335 P2d 690 III Dist.

The Court of Appeal erred in destroying the broker's rights to her compensation against the seller. The Court of Appeal applied the law where the broker does not have a written employment contract with the seller to protect his rights to his compensation and depends solely on the contract between the buyer and the seller for payment of his compensation.

In the case at bar, appellant broker was protected by her exclusive employment contract with the seller for her compensation. The broker earned her compensation prior to the seller taking it into his own hands to finalize it. The broker had a right to offset her compensation in part out of the $20,000.00.

4. It is an inexplicable and manifest injustice to deprive the broker of her rightfully earned compensation that she earned fo r years ago. Under threat of execution broker Generes was compelled to satisfy the unjust judgment on remittitur which included interest from 7-14-72, plus costs of suit; and costs on appeal.

5. There was a denial of due process and a fair hearing before the appellate courts.

The buyers Stiches (appellants) did not send the Clerk and Reporter's transcripts to petitioner-respondent to use in preparation of her brief. Generes requested an extension of time as she did not have the transcripts but her duly noticed motion was refused by the Court of Appeal. The Court of appeal granted lengthy ex parte motions to the Stiches to file both their briefs.

> "There was nothing mysterious or sinister about our failure to forward the transcripts to you pursuant to Rule (10) c; the brief was completed hurriedly and finalized after I left for the East Coast and everybody forgot about your request. /s/ Edward Lascher."

The Courts have said a denial of access to the use of material necessary in preparation of a defense is a denial of due process under the Fifth and Fourteenth Amendments of the Constitution of the United States. Stiches' counsel's positions on the State Board of Governors and his journalistic works in association with the appellate justices and Chief Justice of California should not give him the power to deny another person's guarantees and privileges and deprive his opponent of Constitutional Rights.

The denial of due process was raised by respondent-appellant in her brief at page 2, filed in the Court of Appeal on April 2, 1975 and in oral argument November 20, 1975 in the Court of Appeal as an assignment of error but it was ignored by the Court.

S U M M A R Y

The contract between the broker and the seller is separate from the contract between the buyer and the seller; and one does not depend on the other. The seller did not appeal the judgment against him in favor of the broker. Broker Generes could not appeal a judgment against the seller in her favor. The Court of Appeal abused its discretion and should not have reversed that portion of the judgment in favor of appellant broker against Seller Brown. The fact the seller acted in collusion with the buyers and agreed not to be bound by the executed sales contract cannot relieve the seller of his liability for the broker's compensation under the employment contract he executed with the broker.

C O N C L U S I O N

Appellant Generes is entitled to her rightfully earned compensation and a judgment against Seller Brown for $20,439.30 together with interest at 7% per annum from May 18, 1972 and costs of suit and costs of appeal.

Respectfully submitted,

HELEN FAYE GENERES
2538 Waldon Street
Redding, California
916-243-0586
Appellant

APPENDIX

APPENDIX "A"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA

Hon. Richard B. Eaton, Judge Dep't. I

Minute Book 93 Page 28 September 4, 1973

Filed: Sept. 4, 1973 Richard C. Brennan
Clerk by N. Richardson Deputy Clerk

#45738

EUGENE D. STICH et ux, Plaintiffs

vs.

HELEN FAYE GENERES, et al. Defendants

MEMORANDUM OF DECISION

I THE COMPLAINTS

1. Mr. and Mrs. Stich (intended buyers of a beverage distributorship, Shas-Cade Distributing Company, complain against Mrs. Generes (broker in the transaction). They allege that she detains moneys paid by them as deposits in connection with the sale and has withheld their furniture stored with her. They pray for a declaration of rights, and for general, special and punitive damages.

2. Mrs. Generes cross-complains against the Stiches, Mr. Shuman (attorney consulted by the Stiches), Mrs. Hill

(owner of the premises on which the distributorship was located, and intended lessor thereof) and Mr. Brown (intended seller of the distributorship). She alleges the Stiches, Mr. Brown and Mrs. Hill refused to complete the transaction agreed and that Mr. Shuman induced the Stiches so to refuse. She prays for a declaration of rights, and for general, special and punitive damages.

3. Mrs. Hill cross-complains against Mrs. Generes. She alleges the invalidity of a document prepared by Mrs. Generes and prays cancellation thereof.

II THE UNDISPUTED FACTS

1. Mr. Brown owned Shas-Cade Distributing Company, a business in Redding selling beer, wine and soft drinks. Mrs. Generes was a licensed real estate broker in Redding, California.

2. On March 15, 1972 Mr. Brown and Mrs. Generes executed an Exclusive Authorization and Right to Sell (Exhibit T) whereby Mr. Brown authorized Mrs. Generes to sell Shas-Cade for $204,393. with 10% commission. On March 28, 1972 this listing was somewhat modified (Exhibit U).

3. Mrs. Generes advertised the property Her advertisement came to the attention of Mr. Stich and wife, from southern California, who made various inquiries.

4. On May 15, 1972 the Stiches signed and on May 18, 1972 Mr. Brown signed, a Deposit Receipt and Agreement of Sale (Exhibit 3) for the sale of the distributorship for $226,000.

5. Likewise on May 15, 1972, the Stiches added some terms to the agreement (Exhibit 4). On May 18, Mr. Brown did the same (Exhibit 5) and the Stiches agreed thereto on May 25, 1972 (Exhibit 6, Exhibit X).

6. On May 15, 1972 the Stiches had deposited $5000. with Mrs. Generes (Exhibit 2) and on May 26, 1972 they deposited $15,000. (Exhibit 9).

7. The building in which Shas-Cade was located, had a walkin box and compressor included therein, were the property of Mrs. Hill, who had leased them to Mr. Brown (Exhibit 15). On June 30, 1972 Mrs. Hill conditionally cancelled this lease (Exhibit 14) and on July 1, 1972 Mrs. Hill and the Stiches executed a new lease (Exhibit 16). On July 10, 1972 the Stiches deposited with Mrs. Generes the first months rent under this lease, in the sum of $500. (Exhibit 19).

8. On July 6, 1972, Mrs. Hill and Mrs. Generes executed an Exclusive Authorization and Right to Sell (Exhibit 17) (Exhibit 22) for the Real property involved and the walk in box and compressor. This was accepted by the Stiches July 10, 1972.

9. In the meantime Mr. Lopez, an attorney, had drafted for Mr. Brown a formal agreement of sale (Exhibit 11). Mr. Stich made various objections thereto, and a dispute ensued. On July 14, 1973, after consultation with Mr. Shuman, the Stiches gave notice of rescission of the purchase (Exhibit 20).

10. On August 4, the Stiches demanded return of the funds which they had deposited with Mrs. Generes (Exhibit 21). The same day theydemanded return of furniture which without payment they had stored in her warehouse (Exhibit 22). On August 6, 1973 the furniture was returned in good order (Exhibit R).

11. On August 8, 1972 Mrs. Hill gave notice of recission of her authorization and right to sell (Exhibit 23).

III THE DISPUTED FACTS

1. The Stiches say, and Brown agrees, that they considered their Deposit Receipt and Agreement of Sale as merely a receipt a prelude to a formal agreement, and a declaration of intention to negotiate for such an agreement. By contrast, Mrs. Generes says this was the definitive agreement to be supplemented by security documents as therein provided. There is evidence that in sales of businesses a more elaborate and formal agreement commonly follows the Deposit Receipt.

2. Notwithstanding their stated position that the sale was not yet agreed, the parties thereto, in reliance thereon, took the following actions:

A. Mr. Stich quit his job in Southern California, sold his house there (Exhibit E) and moved his family and his furniture to Redding.

B. The Stiches approved (Exhibit 8) the operating statement of Shas-Cade (Exhibit 7; applied for and obtained a transfer to their names of the State liquor license of the business (see Exhibit W-1) with a stock in trade not including Pepsi Cola (Exhibit W-2; and applied for a Federal liquor license (Exhibits KK, NN).

C. Mr. Brown joined in the application for transfer of the State liquor license.

3. The negotiations apparently broke down over six points of dispute, as follows:

A. The Deposit Receipt and Agreement of Sale listed the compressor and a safe belonging to Mr. Brown. The Stiches later acknowledged that these items, as well as the walkin box belonged toMrs. Hill (Exhibit 13, Exhibit DD). Mr. Brown offered to supply another compressor (Exhibit AAA) but refused to abate his price, as he (or Mr. Lopez) thought the Stiches were getting a bargain as it was.

B. The Deposit Receipt and Agreement of Sale contained no covenant not to compete. Mr. Brown had earlier refused one, in his modification of the listing; and he refused to alter his position until a few hours after the Stiches' recission. Then he did agree to a covenant not to compete. The matter was of importance, as he intended to continue in a related business (Exhibit K).

C. The Deposit Receipt and Agreement of Sale left to the Stiches the problem of continued supply from the wholesalers who had been supplying Mr. Brown. Some assurances to this effect were obtained by Mrs. Generes (Exhibits LL, MM).

D. The Deposit Receipt and Agreement of Sale set no value on the stock in trade to be paid by the Stiches. It was initially represented to the Stiches as about $10,000. In the final negotiation, Mr. Lopez represented it as about $30,000. In fact, Mr. Brown, having some intimation of the problem, had drawn it down to about $8800. The Stiches were notified of this a few hours after their rescission.

E. The Deposit Receipt and Agreement of Sale apparently contemplated an escrow at least, if not a transfer, by June 15, 1973. On July 11, 1972, the sale was still under negotiation, but the Stiches were demanding, without result, a rollback of operating profits to July 1, 1972.

F. Mr. Brown had reserved Pepsi Cola from the brands he was selling, but the Stiches were to carry a new brand of beer, Mickey Malt, which Mr. Brown had not been selling.

4. Mrs. Generes says Mr. Shuman was her attorney, in that she referred the Stiches to him, and in that he drafted, at her request, the letter accompanying the Stiches' $500. deposit, in response to a letter she brought in from Mrs. Hill (Exhibit 19). She says that Mr. Lopez was attorney not alone for Mr. Brown but for Stiches as well, in that he drafted

their notice to creditors (Exhibit S) and billed the Stiches for it (Exhibit VV). Mr. Shuman says that he acted as attorney for the Stiches and Mr. Lopez says that he acted as attorney for Mr. Brown

5. Mrs. Hill savs that the new lease and still more her Exclusive Authorization and Right to Sell were obtained from her by importunity on the part of Mrs. Generes, that she never intended in fact to sell, and that Mrs. Generes told her that the Authorization was merely to authorize the Stiches to make later offer to purchase the premises. She adds that she never realized that rental payments were to be applied on the sale price under the option. Mrs. Generes says that both the lease and the Authorization were read over by and with Mrs. Hill.

6. After the Agreement of Sale was executed, Mrs. Generes took the Stiches to the Department of Alcoholic Beverage Control to arrange transfer to them of the liquor license. She arranged a transfer of the sales tax certificate (Exhibit CC, and endeavored to secure credit for the Stiches (Exhibit HH). Even after the Stiches gave notice of rescission, she was trying to get them and Mr. Brown together in Judge Aleck's office to draft an acceptable covenant not to compete. (Exhibits D-1,2).

IV THE LAW

1. Duty of Attorney. "It would be inimical to the administration of justice if an attorney were to be held liable to a malicious prosecution action, where after an honest, industrious search of the authorities, upon facts stated to him by his client, he advises the latter that he has a good cause of action, although the courts upon a trial of such action decides that the attorney's judgment was erroneous. If the issue which the attorney is called upon to decide is fair ly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court. And if it subsequently is determined that the position honestly taken by the attorney was erroneous he should be relieved from responsibility." Murdock vs. Gerth 66 CA2d 170 at 179 - headnote 6).

"An attorney acting strictly as such may give advice to a client in the absence of fraud or collusion without rendering himself liable to a third party for damages in a civil action" (Daly v. Smith, 220 CA 2d 592 at 604 headnote 20).

2. Consent to Agreement. "Ordinarily, it is preseumed that the parties read and understood the import of thier contract and that they had the intention which its terms manifest" (Heidlebaugh vs. Miller, 126 CA2d 35 at 37 headnote 1, in part).

"No claim was made that the signature of either party to the instrument was obtained by fraud, duress, or undue influence, nor is reformation sought for mutual mistake. So far as appears from the records, they (here the Stiches and Mr. Brown) signed it freely and voluntarily, and it is unnecessary to cite authorities in support of the doctrine that under such circumstances the parties to an instrument must be deemed bound by the plain import of the language used. (Silva v. Sila 32 CA 115 at 117).

"Although generally one is presumed to know the meaning of unambiguous language and will be bound by the provisions of a written instrument including it, the rule applies only in the absence of fraud, confidential relationship, or circumstances indicating excusable mistake."

"If the court was satisfied from all the evidence at the trial that notwithstanding such examination and reading, the plaintiff (here Mrs. Hill) read but did not understand the terms of the instrument and was not aware that they provided for the 25 years instead of 6 months option, it was authorized to find that the agreements wereaccepted by plaintiff under a mistake in this particular." Reid v. London 166 CA2d 476 at 483 headnote 4 and headnote 7, in part).

3. Broker's Compensation. "A broker's commission is earned when the vendee and vendor have executed a binding, written agreement between them upon the terms provided in the contract of employment of the broker, and the vendeee is ready, willing, and able to perform the contract on the terms prescribed."

"The readiness, willingness, and ability of the vendee is conclusively presumed in a suit by a broker to recover his commission upon proof that the vendor has entered into a valid contract of purchase and sale with the vendee."

"The right of the broker to his commission is not affected by failure of either party to carry out the agreement" Cardoza v. Moorehouse 197 CA 2d 76 at 78, 79 headnotes 2, 3, 4).

"Generally speaking, a real estate broker has earned his commission when he has brought to the vendor a purchaser who is ready, willing and able to buy the property upon the terms on which the agent is authorized to sell, or when a written contract upon any terms accept able to the seller has been entered into with the purchaser (as here) originally brought to the vendor by the agent. It is not necessary for the sale to be completed under the foregoing rule, for the broker to be entitled to his commission."

"In the instant case, if the parties had entered into the usual type of real estate broker's contract, the respondent would have been liable despite the subsequent termination of the sales agreement. Although, the trial court found the vendor had made no false representations justifying the purchaser's attempt rescission, nevertheless, the vendor and the purchaser agreed between themselves on the terms of the rescission.

Thus, it appears, that the vendor upon no compulsion of court order, voluntarily yielded to what the trier of fact (here) has determined to be an unjustified demand. By so doing he could not, under a standard brokerage contract, deprive the broker of the fruits of his labor. Some cases have excused a seller from liability to the broker after rescission if the seller acted in good faith. It is not an act of good faith; however, to collusively agree with a buyer to terminate the purchase contract, or to acquiesce in wrongful insistence upon rescission. The binding written promises of a contract upon which a third person relies for compensation earned, may not be so casually reduced to mere illusory texture."

Cochran vs. Ellsworth 126 CA 2d 429 at 439 , 439 Headnotes 5, 7 in part.

4. Set-off. "There can be no dissent from the doctrine that one who owes money to another on a written or other contract may meet its demands by setting off counter obligations arising on contract and existing in his own favor" (Downey v. Humphreys, 102 CA2d 323 at 335 headnote 14, in part).

5. Damages. "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon" Civil Code Section 3302).

"In an action for breach of an obligation not arising upon contract where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example, and by way of punishing the defendant" Civil Code 3294.

"Punitive damages are not recoverable where compensatory damages are not."

"It is well settled that punitive damages may not be awarded in an action based on contract, even though the defendant's breach was wilful or fraudulent" (Contractors Safety Association v. Calif. Comp. Ins. Co., 48 C2d 71 at 77 headnotes 8, 9).

"An award of exemplary damages cannot be based on mere speculation, it depends instead on a definite showing of a willingness to vex, harass, or injure consistent with a wrongful intent to injure."

"It follows that a tort committed by mistake, in the assertion of a supposed right, and without any wrong intention, and without such recklessness as evinces malice or a conscious disregard of the rights of others does not warrant punitive damages". Roth vs. Shell Oil Co. 185 CA2d 676 at 682 headnotes 6 and 8 in part).

6. Costs....if the prevailing party recovers judgment which could have been rendered in a court inferior in jurisdiction...such prevailing party shall not recover costs unless the judge ...in his discretion makes an order allowing costs or such part thereof as he deems proper. (Code of Civil Procedure Section 1032 d).

COMMENT

The court makes the following comments:

1. Mrs. Generes appeared in propria persona.

2. The motion that Mr. Shuman was representing Mrs. Generes, and that Mr. Lopez represented both Mr. Brown and the Stiches is not supported by the evidence. Referring a client to a lawyer imposes

on the lawyer no duty to represent the interest of the person making the reference. Mr. Shuman was attorney for the Stiches and Mr. Lopez was the attorney for Mr. Brown, and each performed in this transaction the normal function of a counselor at law- namely, to serve the interests and wishes of his client. In doing so. the attorney has the duty to use fidelity and professional good sense; but he is not required to be infallible. In any lawsuit, some attorney's professional opinion does not ultimately prevail in the courts, but the attorney is not, as a result, personally liable in damages. If this be true as to his own client, a fortiori it is true as to an adverse party, to whom the attorney owes no duty or service.

3. As any person active in business knows, the basic purpose of a written agreement is to create and to define a binding obligation. Litigants who say they did not read what they signed, or did not understand what they read, are viewed by the courts with a natural scepticism. Proof of such contentions must be convincing. In the present case, Mrs. Hill no doubt understood the new lease. Her Authorization and Right to Sell however, presents a special problem. This document, A California Real Estate Association standard form for the sale of real property, has been so completed as to specify a lease and a 6 year option as the thing sold. It is further provided that lease rental payments (less the taxes and the insurance) are to be applied on the option price. The peculiar disadvantage

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to Mrs. Hill of this arrangement lends credence to her claim that she was not aware of it. In any event, the right to a broker's commission arise only upon a sale of the property, or upon prevention of sale by the seller; whereas here no sale (as distinct from option) was agreed, and the critical obstacle was the buyer's change of mind. There is no visible reason for Mrs. Generes to retain the $500. that has been deposited by the Stiches on account of the lease, and Mrs. Hill should be free of the encumbrance of the authorization.

4. Mrs. Generes' two day delay in releasing the Stiches' furniture, after she had stored it for them for the better part of a month without charge, is a trifle, warranting no more than nominal damages.

5. The Deposit Receipt and Agreement of Sale was a form designed for use as an agreement of sale. Properly completed, it is capable of providing all the terms of a simple transaction for the sale of real property, and of binding the parties thereto. A more complicated transaction, such as the present one, may have to be shoehorned into the agreement form, but this appears to have been done in the present instance. The fact that further documents, including a security agreement, would be required is nothing unusual. Most marital separation agreements contain a similar proviso.

The agreement of sale does have inconsistent provisions respecting computations of interest; but action to cure this by interpretation or reform of the document does not appear now to be indicated. The Agreement of Sale also did not resolve the six points later disputed. However, it does not appear that either the Stiches or Mr. Brown foresaw dispute upon these points when the agreement was signed. The inference is to the contrary. Neither does it appear that the Stiches or Mr. Brown were ignorant or misled as to the contents of the Agreement of Sale. Parties, are, of course, free to say, "we are only opening a negotiation", but they are not free intentionally to sign a n agreement binding in terms, and then to say, "we didn't really mean it", in any situation where rights of third parties have arisen from such agreement.

6. The broker is entitled to the benefit of an agreement of sale duly executed. Her compensation depends on it. It is the broker's business to persuade the parties to make such Agreement of Sale, but she is not required to see that it is performed. However, the broker is more likely to get her compensation without a lawsuit if the agreement <u>is</u> performed. Thus, Mrs. Generes' continuing efforts to carry forward the sale are natural. She brought the buyer and the seller together; she drafted an Agreement of Sale which they both executed; until and after the Stiches' notice of recission, she kept on working toward a resolution of the points in dispute which had arisen after the execution of the Agreement of Sale.

7. The points of dispute of the stock in trade and of the covenant not to compete were resolved on the very day the Stiches rescinded. Mr. Brown had no duty, and (so far as appears) no ability, to constrain his suppliers to continue to trade with the Stiches. The roll back of profits issue was still uncertain, and the Stiches were apparently willing to accept a leasehold tenure to the walk in and compressor, and accepted the exclusion of Pepsi Cola from the sale. Under these circumstances, it does not appear that the Stiches had either the need or the right to rescind. In some respects they would get more, in some respects less, than the Agreement of Sale provided; but negotiations were still in progress, and there had been no definitive action, without their consent, to deny them anything the Agreement promised them.

8. The Stiches and Mr. Brown were not adversary parties and; therefore, ther reciprocal rights do not require adjudication, save as the rights of other parties may demand. Prima facie the paragraph next preceding this one suggests that the Stiches owe Mr. Brown 10% of the agreed sale price, in consequence of their failure to perform the Agreement of Sale. This would be $22,600.

The Stiches have deposited with Mrs. Generes for Mr. Brown's benefit a total of $20,000. They do not show good cause for refund thereof.

9. Mr. Brown owes Mrs. Generes 10% of the selling price shown in his authorization. This would be $20,439.30. It is appropriate for Mrs. Generes to collect this debt from Mr. Brown's money's in her hands, so far as they go, and then to look to Mr. Brown for the balance.

10. This case has been extremely complex, because of the diversity of parties and of issues. The rights of any party were reasonably in controversy prior to the present court decision, and the making of the decision has not been free from difficulty and doubt. The earlier assertion any part of his interest in the controversy by no means indicates oppression, fraud, or malice. The award of punitive damage to any party is unwarranted.

VI JUDGMENT

Let judgment be entered herein:

1. On Mrs. Hill's cross-complaint:

That her Exclusive Authorization and Right to Sell be declared a nullity; that she recover her costs.

2. On Mrs. Generes' Cross-Complaint:

(a) Against Mr. Brown:

That she recover $439.30 with interest at 7% from date of judgment, but without costs; that she retain the $20,000. deposited with her on account of the purchase price of Shas-Cade.

(b) Against Mrs. Hill: That she take nothing; that Mrs. Hill recover costs.

(c) Against Mr. Shuman: That she take nothing; that Mr. Shuman recover costs.

(d) Against the Stiches: That she take nothing on account of damages; that she retain the $20,000 deposited with her on account of the purchase price of Shas-Cade.

3. On the Stiches' Complaint: That they recover $525, with interest at 7% from the date of judgment, but without costs, being the $500. deposit made on account of lease rental, and $25. for delay in releasing the furniture.

Mr. Shuman will prepare appropriate documentation for this decision.

/s/ Richard B. Eaton
RICHARD B. EATON
Judge of the Superior Court

cc Helen Faye Generes
H. R. Harrison Smith § Frank W. Shuman
Carr, Kennedy, Peterson § Frost
Lopez, Kennedy § Srite
Cresswell, Martin § Lamborn
(See attached affidavit of Mailing).

Appendix B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT (Shasta)

Remittitur

EUGENE D. STICH, et al. Plaintiffs and Appellants vs. HELEN FAYE GENERES, Defendant and Respondent	3rd Civil 14526 (Sup. Ct. 45738) Filed. Jan. 26, 1976 Court of Appeal Third District Wilfried J. Kramer Clerk

Defendant Generes is a real estate broker who obtained an exclusive listing to sell a business. She accepted $20,000 from the Stich, a prospective buyer, as a deposit. Stich and Brown, the seller, signed a "deposit receipt" which in form was a contract of sale, but both testified they did not ever intend it to be legally binding. Negotiations between the two were terminated and neither asserted any claim against the other. Generes, however, refused to return the $20,000. to the buyer and claimed it as a rightfully earned commission.

Stich sued Generes for "declaratory relief," alleging that she is not entitled to the money and that it belongs to him.

Generes cross-complained against Stich, Brown, Shuman for "breach of contract and breach of trust."

There being no contract between Brown and Stich, no commission was ever earned, there was never a breach of contract, and no money damages ever accrued in favor of any party. Stich is entitled to return of his deposit.

The judgment is reversed with directions to the trial court to enter judgment declaring that the $20,000. deposit is the property of Stich and to order the same restored to him forthwith by Generes.

PARAS J.

We concur:

PUGLIA P.J.
JANES J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAR 24 1976

I have this day filed Order

HEARING DENIED

In re: 3 Civ. *No.* 14526

Stich, et al.

vs.

Generes, et al.

Respectfully,

G. E. BISHEL
Clerk

38825-977 11-75 3M OSP

Appendix "C"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA

Eugene D. Stich, et al.,
Plaintiffs-Appellants

vs.

Helen Faye Generes,
Defendant-Respondent

No. 45738

Filed: March 30, 1976 Richard C. Brennan
Clerk by G. Swickard, Deputy Clerk

NOTICE IS HEREBY given that in the above entitled matter the following proceeding has been had:

REMITTITUR filed this date.

The judgment is reversed with directions to the trial court to enter judgment declaring that the $20,000. deposit of Stich held by Generes is the property of Stich and to order the same restored to him forthwith by Generes.

Appellant to recover costs.

RICHARD C. BRENNAN
County Clerk
By G. Swickard
Deputy Clerk

Dated: March 30, 1976

Appendix "D"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA

Minute Book 107 Page 431 March 31, 1976

Eugene D. Stich et al.
Plaintiffs - Appellants
vs.

Helen Faye Generes,
Defendant - Respondent

45738
Nature of Proceedings: JUDGMENT

In accordance with the Remittitur filed March 30, 1976 by the District Court of Appeal;

IT IS ORDERED that judgment is reversed and the $20,000. deposit of Stich held by Generes is the property of Stich and shall be returned to him forthwith by Generes.

Appellant to recover costs in the sum of $_____.

RICHARD B. EATON - Judge

cc Helen Faye Generes
Lopez, Kennedy & Srite
Carr, Kennedy, Peterson & Frost
Cresswell, Martin & Lamborn
Edward L. Lascher
Certificate of Mailing dated March 31, 1976
signed by D. Johansen, Deputy Clerk.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SHASTA

Minute Book 108 Page 327 May 18, 1976

EUGENE D. STICH et al.
Plaintiffs
vs. No. 45738
HELEN FAYE GENERES,
Defendant.

Nature of Proceedings: Directions to Clerk

1. Defendant herein on May 17, 1976 submitted a form of judgment on cross-complaint, in her own favor, and against cross-defendant Brown, in the sum of $20,439.30 with interest and costs, as her real estate agent's commission herein. She also submitted a corresponding writ of execution.

2. The Court of Appeal has held herein that "there being no contract between Brown and Stich, no commission was ever earned, there never was a breach of contract and no money damages accrued in favor of any party."

3. The clerk will therefore receive and retain without action the documents first mentioned.

/s/ RICHARD B. EATON, Judge

cc Edward L. Lascher
Cresswell, Martin & Lamborn ; Carr, Kennedy, Peterson and Frost; Helen Faye Generes
Richard C. Brennan
Lopez, Kennedy and Srite

Appendix "F"

COURT OF APPEAL-THIRD APPELLATE DISTRICT
and/or
SUPERIOR COURT OF CALIFORNIA- Shasta Co.

EUGENE D. STICH, et al.
Plaintiffs, cross-Defendants-Appellants
vs.
HELEN FAYE GENERES,
Defendant, Cross-Complainant, Respondent.

Notice of Appeal

3rd Civil 14526

Sup. Ct. 45738

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD AND TO THE CLERK OF THE COURT OF APPEAL AND THE CLERK OF THE SHASTA COUNTY SUPERIOR COURT:

Helen Faye Generes appeals from that portion of the judgment on remittitur in favor of THOMAS F. BROWN entered in Minute Book 107 Page 431 March 31, 1976; and in Minute Book 108 Page 327 on May 18, 1976. The permanent Minute Book of the Shasta County Superior Court- Dept. I.

The jurisdiction of this court is invoked under 28 U. S. C. 1257.

Dated: May 20, 1976. Redding, California.

/s/ HELEN FAYE GENERES
Defendant and Cross-Complainant

Filed in Court of Appeal on May 24, 1976 Third District-Wilfried J. Kramer Clerk.
Filed in Shasta County Superior Court on May 27, 1976 Richard C. Brennan, Clerk by C. Richilieu, Deputy Clerk.

Affidavit of Mailing (2015.5 C.C.P.

The undersigned, under penalty of perjury, declares that she is a citizen of the United States and a resident of the County of Shasta, over the age of 18 years and not a party to the within action, with business address of 1708 Placer Redding, California; and there is delivery service to United States Mail to each place addressed; that she executed this certificate on this date and served a true copy of the foregoing document Notice of Appeal 45738 by placing same in an envelope in the United States Post Office Mail Box at Redding, California on the 20th day of May 1976 said envelope addressed as follows:

Edward L. Lascher, Atty. P. O. Box AJ, Ventura, Ca. 93001
Lopez, Kennedy & Srite, Attys. P. O. Box 1826, Redding, Ca. 96001
Carr, Kennedy, Peterson and Frost, Attys. P. O. Box 2007, Redding, Ca. 96001
Cresswell, Martin and Lamborn, Attys. 270 Grand Ave. Oakland, Ca. 94610
I declare under penalty of perjury the foregoing is true and correct.

/s/ Lenora Smith.

V E R I F I C A T I O N

Helen Faye Generes, being first duly sworn states that she has read the foregoing document and understands it; and that it is true and correct to the best of her knowledge and belief.

_____

State of California
County of Shasta

Helen Faye Generes, being first duly sworn did appear before me this 3rd day of June 1976 and did sign the foregoing instrument in my presence. My commission expires_____.

_____
NOTARY PUBLIC

AFFIDAVIT OF MAILING

Thae undersigned under penalty of perjuury declares that she is a citizen of the United States and a resident of the County of Shasta over the age of 18 years and not a party to the within action with a business address of 1708 Placer, Redding, California; and that there is delivery service to the United States Mail to each place addressed; and that she executed this certificate on this day and served a true copy of the foregoing document by placing same in an envelope fully prepaying postage thereon and depositing said envelope in the United States Post Office Mail Box at Redding, California on the third day of June 1976; said envelope addressed as follows:

Lopez, Kennedy & Srite, 1616 West Street, P. O. Box 1826, Redding, California 96001.

Court of Appeal, Third Appellate District, Library and Courts Building, Sacramento, California. 95814.

I declare under penalty of perjury the foregoing is true and correct.

Lenora Smith

ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED.

cc Moses Lasky, Esq. California Association of Realtors, 505 Shatto Place, Los Angeles, Calif. 90020.